



1966

Right of Directors to Inspect Corporate Books and Records

Martin G. McGuinn Jr.

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Business Organizations Law Commons](#)

Recommended Citation

Martin G. McGuinn Jr., *Right of Directors to Inspect Corporate Books and Records*, 11 Vill. L. Rev. 578 (1966).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol11/iss3/6>

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

RIGHT OF DIRECTORS TO INSPECT CORPORATE BOOKS AND RECORDS

I.

INTRODUCTION

Corporate directors must thoroughly inform themselves of the affairs of the corporation in order to discharge properly their duties as fiduciaries of the corporation and guardians of the shareholders's interests. Since breach of these fiduciary duties may be a basis for imposing personal liability on directors, they generally have a wide scope in which to exercise the right to inspect corporate books and records.¹ This is one of the few rights which inures to directors as individuals² and, according to the weight of authority, it is so firmly imbedded that a director may be charged with negligence for a failure to inform himself of matters shown by the books of the company.³

The right of a director to inspect the records "springs from his duty to protect and preserve the corporation."⁴ The stockholders' right, on the other hand, rests upon their ownership of the corporation's assets and property. The difference in the source of the right points up the director's more pervasive need to have access to corporate information and, consequently, the courts in many jurisdictions have granted the director an absolute and unqualified right to inspect corporate books and records as opposed to the qualified right of a stockholder.⁵ A shareholder's right extends to examination of the books and papers only at reasonable times and places and for proper purposes.⁶ This qualified right was recognized at common law and today is largely controlled by statute.⁷

1. See generally, Annot., 15 A.L.R.2d 11, 41, 63, 67, 76, 88 (1951); 5 FLETCHER, PRIVATE CORPORATIONS § 2235 (perm. ed. rev. repl. 1952); BALLANTINE, CORPORATIONS § 165 (rev. ed. 1946); HENN, CORPORATIONS § 217 (1961).

2. 1 HORNSTEIN, CORPORATION LAW AND PRACTICE § 421 (1959).

3. 3 FLETCHER, PRIVATE CORPORATIONS § 1060 (perm. ed. rev. repl. 1965); see also Adkins & Janis, *Some Observations on Liabilities of Corporate Directors*, 20 BUS. LAW. 817 (1965).

4. *State ex rel. Farber v. Seiberling Rubber Co.*, 53 Del. (3 Storey) 295, 298, 168 A.2d 310, 312 (1961), Note, 19 WASH. & LEE L. REV. 281 (1962).

5. *Drake v. Newton Amusement Corp.*, 123 N.J.L. 560, 9 A.2d 636 (1939); *Davis v. Keilsohn Offset Co.*, 273 App. Div. 695, 79 N.Y.S.2d 540 (1948); *Machen v. Machen & Mayer Electrical Mfg. Co.*, 237 Pa. 212, 85 Atl. 100 (1912); *State ex rel. Aultman v. Ice*, 75 W.Va. 476, 84 S.E. 181 (1915).

6. *Guthrie v. Harkness*, 199 U.S. 148 (1905); *Matter of Steinway*, 159 N.Y. 250, 53 N.E. 1103 (1899); *Klein v. Scranton Life Ins. Co.*, 139 Pa. Super. 369, 11 A.2d 770 (1940). See generally, 5 FLETCHER, PRIVATE CORPORATIONS §§ 2213-57 (perm. ed. rev. repl. 1952); Bartels & Flanagan, *Inspection of Corporate Books and Records in New York by Stockholders and Directors*, 38 CORNELL L.Q. 289 (1953); Note, *Inspection of Corporate Books and Records in Delaware*, 41 VA. L. REV. 237 (1955).

7. *E.g.*, DEL. CODE ANN. tit. 8, § 220 (Supp. 1964); N.Y. STOCK CORP. LAW § 10; PA. STAT. ANN. tit. 15 §§ 2852-308 (Supp. 1965). See also, Koenigsberg, *Provisions in Charters and By-laws Governing The Inspection of Books by Stockholders*, 30 GEO. L.J. 227 (1942).

II.

ABSOLUTE RIGHT OF INSPECTION

A director's access to the books and records of a corporation is more extensive than a shareholder's for the further reason that the information contained therein is essential for the director's effective management of the corporate business and exercise of the judgment required in the performance of his duties. A large number of courts have, therefore, termed this right absolute and unqualified.⁸ Inspection is allowed in such jurisdictions regardless of the director's motives and so long as he is in office,⁹ he may inspect even though his quest is inimical to the interest of the corporation.¹⁰ To be entitled to an inspection, one need show only that he is a director of the company, that he has demanded permission to examine and that his demand has been refused.¹¹

Inspection has been granted despite contentions that the director was interested in a competing concern and had interfered with the proper management of the corporation,¹² that he was hostile,¹³ that he sought to injure the corporation and aid its competitor,¹⁴ that he sought only to further a claim against the corporation,¹⁵ and that he was obviously a dummy director without any interest in the company.¹⁶

The usual rationale of the New York courts has been that if a director is so hostile as to justify his removal from office, such is the proper remedy,¹⁷ and "the law has provided a method by which that end can be accomplished, but, so long as he remains a director, he cannot be denied

8. *Leach v. Davy*, 199 Mich. 378, 165 N.W. 927 (1917); *State ex rel. Watkins v. Cassell*, 294 S.W.2d 647 (Mo. App. 1956); *Drake v. Newton Amusement Corp.*, 123 N.J.L. 560, 9 A.2d 636 (1939); *People ex rel. Muir v. Throop*, 12 Wend. 183 (N.Y. 1834); *Machen v. Machen & Mayer Electrical Mfg. Co.*, 237 Pa. 212, 85 Atl. 100 (1912); *State ex rel. Aultman v. Ice*, 75 W.Va. 476, 84 S.E. 181 (1915).

9. *E.g.*, *Application of Hafter*, 67 N.Y.S.2d 746, *aff'd*, 270 App. Div. 995, 62 N.Y.S.2d 861, *aff'd*, 296 N.Y. 808, 71 N.E.2d 774 (1947) ("his right to inspection exists only while he possesses the status of a director"); *People ex rel. Wilkins v. Ascher Silk Corp.*, 207 App. Div. 168, 169, 201 N.Y. Supp. 739, 740, *aff'd*, 237 N.Y. 574, 143 N.E. 748, *rehearing denied*, 237 N.Y. 630, 143 N.E. 770 (1924) ("so long as appellant remains a director"). *Cf.* footnotes 28-39.

10. *People ex rel. Grant v. Atlantic Terra Cotta Co.*, 133 App. Div. 890, 118 N.Y. Supp. 1133 (1909).

11. *People ex rel. Leach v. Central Fish Co.*, 117 App. Div. 77, 101 N.Y. Supp. 1108 (1907); *Machen v. Machen & Mayer Electrical Mfg. Co.*, 237 Pa. 212, 85 Atl. 100 (1912). *Cf.* *Davis v. Cambria Title, Savings & Trust Co.*, 304 Pa. 32, 155 Atl. 108 (1931).

12. *Machen v. Machen & Mayer Electrical Mfg. Co.*, 237 Pa. 212, 85 Atl. 100 (1912).

13. *People ex rel. Muir v. Throop*, 12 Wend. 183 (N.Y. 1834).

14. *Davis v. Keilsohn Offset Co.*, 273 App. Div. 695, 79 N.Y.S.2d 540 (1948).

15. *People ex rel. Wilkins v. Ascher Silk Corp.*, 207 App. Div. 168, 201 N.Y. Supp. 739, *aff'd*, 237 N.Y. 534, 143 N.E. 748, *rehearing denied*, 237 N.Y. 630, 143 N.E. 770 (1923).

16. *People ex rel. Stauffer v. Bonwit Bros.*, 69 Misc. 70, 125 N.Y. Supp. 958 (Sup. Ct. 1910). *Cf.* *Halperin v. Air King Products Co.*, 59 N.Y.S.2d 672 (Sup. Ct. 1946).

17. *Davis v. Keilsohn Offset Co.*, 273 App. Div. 695, 79 N.Y.S.2d 540 (1948); *Halperin v. Air King Products Co.*, 59 N.Y.S.2d 672 (Sup. Ct. 1946); *People ex rel. Leach v. Central Fish Co.*, 117 App. Div. 77, 101 N.Y. Supp. 1108 (1907).

the rights appertaining to the office."¹⁸ Such a rationale is meaningful, however, only if removal, with or without cause, is a remedy sanctioned by state statute¹⁹ and one which can be swiftly enforced. Also, though justifiable in theory, removal may present severe practical difficulties in closely-held corporations which have cumulative voting provisions, since a hostile director might prevent his own removal. Further, when considered the only remedy, it has been criticized as an expensive and cumbersome process.²⁰

The director's right of inspection is based in common law and is rarely affected by statute. The only comprehensive provision is the California statute,²¹ which contains a section providing the right in broad terms. Directors are given the absolute right to inspect *all* the books and physical properties of the corporation and its subsidiaries.

III.

QUALIFIED RIGHT OF INSPECTION

A. *Improper Motive of Director*

A small number of courts have developed a more functional approach to directors' demands for inspection. These courts consider the right qualified and refuse to grant inspection when an analysis of the facts indicates that the purpose upon which the right is founded will not be served. Thus, they conclude that the right ceases when the corporation can show that the director is seeking inspection for reasons adverse to the corporate interest.²²

In *State ex rel. Paschall v. Scott*,²³ a director who was also a minority shareholder was denied access to the books and records relating

18. *People ex rel. Leach v. Central Fish Co.*, 117 App. Div. 77, 80, 101 N.Y. Supp. 1108, 1110 (1907).

19. *E.g.*, CAL. CORP. CODE § 810; N.Y. BUS. CORP. LAW § 706(b); PA. STAT. ANN. tit. 15, § 2852-405 (Supp. 1965).

20. Note, 101 U. PA. L. REV. 555, 556 (1953). See also Bartels & Flanagan, *Inspection of Corporate Books and Records in New York by Stockholders and Directors*, 38 CORNELL L.Q. 289, 314 (1953); Note, 51 MICH. L. REV. 747 (1953); Note, 28 NOTRE DAME LAW. 269 (1953).

21. CAL. CORP. CODE § 3004:

Every director shall have the absolute right at any reasonable time to inspect all books, records, documents of every kind, and the physical properties of the corporation, domestic or foreign, of which he is a director, and also of its subsidiary corporations, domestic or foreign. Such inspection by a director may be made in person or by agent or attorney, and the right of inspection includes the right to make extracts. In the case of foreign corporations this right extends only to such books, records, documents, and properties of such corporations as are kept or located in this State.

22. *Hemingway v. Hemingway*, 58 Conn. 443, 19 Atl. 766 (1890); *State ex rel. Farber v. Seiberling Rubber Co.*, 53 Del. (3 Storey) 295, 168 A.2d 310 (1961); *Stone v. Kellogg*, 62 Ill. App. 444, *aff'd*, 165 Ill. 192, 46 N.E. 222 (1896) (dictum); *Strassburger v. Philadelphia Record Co.*, 335 Pa. 485, 6 A.2d 922 (1939) (dictum); *Dintenfass v. Amber Star Films Corp.*, 39 R.I. 555, 99 Atl. 516 (1917); *State ex rel. Paschall v. Scott*, 41 Wash. 2d 71, 247 P.2d 543 (1952). See also, BALLANTINE, CORPORATIONS § 165 (rev. ed. 1946); 5 FLETCHER, PRIVATE CORPORATIONS § 2235 (perm. ed. rev. repl. 1952).

23. 41 Wash. 2d 71, 247 P.2d 543 (1952).

to marketing practices, sales and customers when the evidence revealed that he had a scheme to interfere with the business by contacting distributors and customers, and by making information regarding the business available to competitors. The Supreme Court of Washington concluded that:

. . . when a director, driven by hostile and improper motives, seeks to examine corporate books and records, he cannot do so under a claim of duty. On the contrary, his purposes and action are completely inconsistent with such duty. The basis of the right which a director has to examine corporate records — the performance of corporate duties — is then wholly lacking, and thus the right itself no longer exists.²⁴

In a recent case in Delaware,²⁵ the court considered a somewhat different case, though involving a similarly improper motive on the part of a director. The precise question was whether such a motive was sufficient in law to deny him the right to inspect the corporate *stock ledger*. The director argued that a request to examine the stock ledger must be distinguished from a request for access to other corporate records, and contended that no jurisdiction had ever denied a director access to the stock ledger.²⁶ The court refused to recognize this distinction, however, and held that the use the director intends to make of the record is controlling, rather than the type of record he seeks to use. Judge Terry concluded that the director's right to inspect can be "termed an absolute right only so long as his purpose is not in derogation to the interest of the corporation."²⁷

B. *Status of Director*

Those jurisdictions which treat the director's right to inspect as absolute have held that such right nevertheless ceases upon termination of his office.²⁸ This limitation extends to foreclose a director who is ousted while his proceeding to enforce inspection is pending.²⁹ Though early decisions in the lower courts of New York indicated that the director would be allowed inspection if he was in office on the date of the commencement of his action,³⁰ subsequent cases³¹ denied the right in similar circumstances, thus causing some writers to conclude at that time that, "[I]t is now

24. *Id.* at 76, 247 P.2d at 549.

25. *State ex rel. Farber v. Seiberling Rubber Co.*, 53 Del. (3 Storey) 295, 168 A.2d 310 (1961).

26. See *Posen v. United Aircraft Products*, 201 Misc. 260, 111 N.Y.S.2d 261 (Sup. Ct. 1952).

27. 53 Del. (3 Storey) 295, 298, 168 A.2d 310, 312 (1961).

28. *Overland v. LeRoy Foods*, 304 N.Y. 573, 107 N.E.2d 74, *affirming* 279 App. Div. 876, 110 N.Y.S.2d 578 (1952); *Haft v. Eagle Fish Co.*, 296 N.Y. 808, 71 N.E.2d 774 (1947), *affirming* 270 App. Div. 995, 62 N.Y.S.2d 861, *affirming* Application of Haft, 67 N.Y.S.2d 745 (Sup. Ct. 1946). See also, note 9 *supra*.

29. *Dines v. Harris*, 88 Colo. 22, 291 Pac. 1024 (1930).

30. Application of La Vin, 37 N.Y.S.2d 161 (Sup. Ct. 1942).

31. See note 28, *supra*.

definitely settled that a removed director has no right of inspection in any case."³²

In *Cohen v. Cocoline Products*,³³ however, the New York Court of Appeals articulated the position taken in their prior decisions³⁴ which had denied the right to an ousted director who did not own stock stating that denial of an *absolute* right did not preclude the existence of a *qualified* right. The court held that such a discharged director may have a qualified right covering the period of his directorship whenever he can make a showing that such inspection is necessary to protect his personal responsibility as well as the interest of the stockholders.³⁵ The majority recognized that the benefit of such a qualified right could very well inure to the stockholders. The potential benefit was especially apparent in this case since the former director seeking inspection was of long service and had unexpectedly failed of re-election just at a time when he was about to undertake an investigation of alleged derelictions of other directors and officers.

The *Cohen* case has particular significance because the demand of a removed director who is not a stockholder must rest upon the sole basis of his former office.³⁶ Of course, if he were also a stockholder, the removed director would retain the qualified right of a shareholder. However, the important limitation imposed upon this qualified right of the former non-stockholding director is that it is within the discretion of the court and may in some respects be more restrictive than the right granted to shareholders, since the burden is placed on the petitioner to show a proper motive.³⁷ Further, it may be limited to situations where the former director's conduct has been called into question and the inspection is needed to prepare his defense. Accordingly, inspection has been denied to an ex-director where a shareholders' suit was but a possibility and not the slightest evidence indicated that such an action was imminent or even contemplated.³⁸

The decision in *Cohen*, therefore, seems to establish the rule that:

time of commencement of the suit is of no moment, so long as it is brought within a reasonable time. Whether the writ will issue is

32. Bartels & Flanagan, *Inspection of Corporate Books and Records in New York by Stockholders and Directors*, 38 CORNELL L.Q. 289, 318 (1953).

33. 309 N.Y. 119, 127 N.E.2d 906 (1955), Note, 44 CALIF. L. REV. 417 (1956); Note, 31 N.Y.U.L. REV. 225 (1956); Note, 9 VAND. L. REV. 95 (1955).

34. See note 28, *supra*. These prior cases did not discuss whether an ousted director retained a qualified right and, as a result, both the majority and dissenting opinions in *Cohen* cite them in support of their respective positions.

35. 309 N.Y. 119, 124, 127 N.E.2d 906, 908 (1955). See also, Application of Guadagno, 33 Misc. 2d 65, 224 N.Y.S.2d 956 (Sup. Ct. 1962). Cf. *Demos v. Copps & Co., Inc.*, 28 Misc. 2d 415, 212 N.Y.S.2d 858 (Sup. Ct. 1961).

36. Criticism has been leveled at the *Cohen* decision since, if a suit were brought against such a non-stockholding director, he would have adequate opportunity to inspect through the use of discovery procedures. See 10 SW. L.J. 75, 77 (1956); 9 VAND. L. REV. 95, 98 (1955); 31 N.Y.U.L. REV. 225, 227 (1956).

37. The majority rule imposes the burden of proving the stockholder's improper purpose upon the corporation. See 5 FLETCHER, PRIVATE CORPORATIONS 2253.1 (perm. ed. rev. repl. 1952). Accord, *Goldman v. Trans-United Industries, Inc.*, 404 Pa. 288, 171 A.2d 788 (1961).

38. *Cohen v. C-C Clubs, Inc.*, 10 Misc. 2d 57, 171 N.Y.S.2d 873 (Sup. Ct. 1958).

discretionary with the court and depends upon a proper showing by the ousted director.³⁹

C. *Exceptional Situations*

Even in those jurisdictions which generally consider the director's inspection right to be absolute, unusual circumstances may cause a court to refuse inspection. In *Posen v. United Aircraft Products, Inc.*,⁴⁰ a director who was a suspected communist was denied access to the books and records of a corporation which largely concerned itself with work for the national defense program. The demand was refused without prejudice, however, and could have been renewed if security clearance were obtained by the director from the responsible federal agency.

Another situation in which the general rule of absolute right was subjected to qualification arose when the corporation was in the process of dissolution.⁴¹ The court denied permission because the inspection was not incidental to winding up the business. Proceeding from the premise that the absolute right had terminated, the court in its discretion refused this inspection since the directors purpose was to acquire information for a personal claim against the corporation. It must be noted that the denial was discretionary, and inspection may have been granted if for a proper purpose. Discretion may also be exercised by limiting the inspection so as not to interfere with the corporate business.⁴²

IV.

SPECIAL PROBLEMS

A. *Nature of Information Sought*

In order that he may be apprised of the true condition of the corporation, the director's right provides for an inspection which is very broad in scope.⁴³ Thus, he may inspect all of the corporate books and records,⁴⁴ as well as the physical assets.⁴⁵

39. Note, 44 CALIF. L. REV. 417, 422 (1956).

40. 201 Misc. 260, 111 N.Y.S.2d 261 (Sup. Ct. 1952).

41. *People ex rel. Bellman v. Standard Match Co.*, 208 App. Div. 4, 202 N.Y. Supp. 840 (1924); 24 COLUM. L. REV. 799 (1924). See *Schor v. Barshor Realty Co.*, 218 N.Y.S.2d 11 (Sup. Ct. 1961).

42. *Melup v. Rubber Corporation of America*, 181 Misc. 826, 43 N.Y.S.2d 444 (Sup. Ct. 1943). Cf. *Diamond v. Jarold Shops*, 91 N.Y.S.2d 585, *rev'd on other grounds*, 275 App. Div. 919, 90 N.Y.S.2d 683 (1949); *Javits v. Investors League*, 92 N.Y.S.2d 267 (Sup. Ct. 1949).

43. See note 1, *supra*. In many of the special problems related to the director's right, analogy to the shareholder's right may be appropriate since the right of the former is almost universally considered to be superior.

44. *Davis v. Keilsohn Offset Co.*, 273 App. Div. 695, 79 N.Y.S.2d 540 (1948); *Halperin v. Air King Products Co.*, 59 N.Y.S.2d 672 (Sup. Ct. 1946); *People ex rel. Leach v. Central Fish Co.*, 117 App. Div. 77, 101 N.Y. Supp. 1108 (1907); *Machen v. Machen & Mayer Electrical Mfg. Co.*, 237 Pa. 212, 85 Atl. 100 (1912). See CAL. CORP. CODE § 3004.

45. *Melup v. Rubber Corporation of America*, 181 Misc. 826, 43 N.Y.S.2d 444 (Sup. Ct. 1943).

It was recently held that :

... the officers should submit to the director seeking inspection *all* the desired records and papers, including those containing incomplete entries or information, with an explanation as to how and why they are incomplete and perhaps inaccurate or misleading.⁴⁶

The lists of stockholders also fall within the scope of a director's inspection, even when the names of stockholders are sought in support of activities intended to seize control of management.⁴⁷ The right, however, does not extend to records which are protected by a legal privilege, such as the physician-patient privilege. Thus, the medical charts of hospital patients have been considered beyond the ambit of inspection.⁴⁸

Further, the director is not limited merely to examination but may be permitted to make extracts of the records or to have them duplicated.⁴⁹ In addition, he has been allowed to obtain a copy of an audit of the company books which was made for the board by an independent public accounting firm.⁵⁰

B. *Right to Assistance*

To achieve a full understanding of the usually complicated corporate books, the director is entitled to professional assistance and, pursuant to this right, has been afforded the aid of attorneys and accountants.⁵¹ Whether the presence of the director is required during the examination, however, is a subject of some conflict. While some courts state that the director need not personally conduct the examination,⁵² others refuse him permission to wholly delegate this personal right to inspect to his agents and require some actual supervision and personal involvement by him.⁵³ In any case, even if a director is entitled to assistance, inspection

46. In *Ex-Lax, Inc.*, 21 App. Div. 2d 786, 787, 250 N.Y.S.2d 572, 574 (1964).

47. *Smith v. Republic Pictures Corp.*, 144 N.Y.S.2d 142 (Sup. Ct. 1955). Cf. *Campbell v. Loews, Inc.*, 36 Del. Ch. 563, 577, 134 A.2d 852, 863 (1957); *Gresov v. Shattuck Denn Mining Corp.*, 29 Misc. 2d 324, 215 N.Y.S.2d 98 (Sup. Ct. 1961).

48. *Hyman v. Jewish Chronic Disease Hosp.*, 21 App. Div. 2d 495, 251 N.Y.S.2d 818 (1964).

49. *Singer v. State Laundry Co.*, 188 Misc. 583, 65 N.Y.S.2d 806, *aff'd*, 271 App. Div. 837, 66 N.Y.S.2d 644 (1946). *Accord*, CAL. CORP. CODE § 3004. See also, BALLANTINE, CORPORATIONS § 164 (rev. ed. 1946); 5 FLETCHER, PRIVATE CORPORATIONS § 2241 (perm. ed. rev. repl. 1952).

50. *Kunin v. Forman Realty Corp.*, 21 Ill. App. 2d 221, 157 N.E.2d 785 (1959).

51. *State v. Missouri-Kansas Pipe Line Co.*, 42 Del. (3 Terry) 423, 36 A.2d 29 (1944); *Davis v. Keilsohn Offset Co.*, 273 App. Div. 695, 79 N.Y.S.2d 540 (1948); *People ex rel. Wilkins v. Ascher Silk Corp.*, 207 App. Div. 168, 201 N.Y. Supp. 739, *aff'd*, 237 N.Y. 534, 143 N.E. 748, *rehearing denied*, 237 N.Y. 630, 143 N.E. 770 (1923). *But see* *Pacent v. Fourth Fed. Savings & Loan Ass'n of N.Y.*, 9 Misc. 2d 37, 167 N.Y.S.2d 550 (Sup. Ct. 1957) (To have such assistance, the director was required to properly plead and prove mismanagement by those in control of the corporation.); Note, 27 U. CIN. L. REV. 116 (1958).

52. *State v. Missouri-Kansas Pipe Line Co.*, 42 Del. (3 Terry) 423, 430, 36 A.2d 29, 32 (1944). See BALLANTINE, CORPORATIONS § 165 (rev. ed. 1946) (No artificial requirement should compel the director to conduct the examination personally.)

53. *Wachman v. Artistic Leather Goods Mfg. Corp.*, 22 App. Div. 2d 900, 255 N.Y.S.2d 396 (1964). See *Bero v. Bero Construction Corp.*, 36 Misc. 2d 453, 233 N.Y.S.2d 150 (Sup. Ct. 1962); *Pugach v. Kaufman*, 23 Misc. 2d 989, 203 N.Y.S.2d 619 (Sup. Ct. 1960).

has been held properly denied when he attempted to bring with him representatives of the corporation's competitors.⁵⁴ If the corporation and director cannot agree upon the selection of an agent, the court may appoint one.⁵⁵

The right to assistance is expressly provided by statute in California.⁵⁶ Although it was originally omitted, the California Code was amended in 1953⁵⁷ to allow a director to delegate the inspection to an agent as well as to include the right to make extracts. Although no express reference to the point appears, supervision by the director does not seem to be required in light of the broad statutory authorization.

C. *Subsidiaries and Foreign Corporations*

Whether the right of inspection extends to the books of a subsidiary depends upon the relationship between the subsidiary and the parent company.⁵⁸ Thus, where there is domination and control of the subsidiary by a holding company, the writ would be granted.⁵⁹ But the parent company's ownership of a majority of the stock of the subsidiary is not necessarily sufficient. If the latter is a separate and distinct corporation with its books and records beyond the jurisdiction and not legally subject to control of the parent, inspection would be refused.⁶⁰ The right may be more extensive, however, for the director of a membership corporation.⁶¹

As a general rule, the books of a foreign corporation doing business in the state are subject to inspection where they are kept or located

54. *People ex rel. Poleti v. Poleti, Coda & Rebecchi, Inc.*, 193 App. Div. 738, 184 N.Y. Supp. 368 (1920); *People ex rel. Bartels v. Borgstede*, 169 App. Div. 421, 155 N.Y. Supp. 322 (1915); *Strassburger v. Philadelphia Record Co.*, 335 Pa. 485, 6 A.2d 922 (1939); *State ex rel. Aultman v. Ice*, 75 W.Va. 476, 84 S.E. 181 (1915).

55. See *Bartels & Flanagan, Inspection of Corporate Books and Records in New York by Stockholders and Directors*, 38 CORNELL L.Q. 289, 317 (1953).

56. See note 21, *supra*.

57. A Committee of the State Bar, which proposed these amendments also suggested that the absolute right of inspection be limited to purposes reasonably related to the legitimate performance of his duties as a director. These proposals were also endorsed by Professor Ballantine who drafted the California General Corporation Law. (Letter to Committee on Administration of Justice, Jan. 15, 1951). Section 3004 was amended to include the right of assistance (Cal. Stat. 1953, c. 899, § 1), but the director's absolute right was not modified. See Note, 44 CALIF. L. REV. 417, 422 n.25 (1956); also cited in Comment, 27 So. CAL. L. REV. 70, 81 n.88 (1953); Note, 39 CALIF. L. REV. 136 n.15 (1951).

58. See *Bailey v. Boxboard Products Co.*, 314 Pa. 45, 170 Atl. 127 (1934) (shareholder seeking inspection). See also CAL. CORP. CODE § 3004; LATTIN, CORPORATIONS 291 (1959); BALLANTINE, CORPORATIONS § 163 (rev. ed. 1946).

59. See *State ex rel. United Brick and Tile Co. v. Wright*, 339 Mo. 160, 95 S.W.2d 804 (1936). See also, 5 FLETCHER, PRIVATE CORPORATIONS § 2228 (perm. ed. rev. repl. 1952).

60. See *State ex rel. Rogers v. Sherman Oil Co.*, 31 Del. (1 W.W. Harr.) 570, 117 Atl. 122 (1922); *Application of Martin*, 32 Misc. 2d 873, 224 N.Y.S. 2d 972 (Sup. Ct. 1962).

61. *Hyman v. Jewish Chronic Disease Hosp.*, 21 App. Div. 2d 495, 251 N.Y.S.2d 818 (1964) (director of hospital membership corporation seeking records of patients); *Dauids v. Sillcox*, 297 N.Y. 355, 79 N.E.2d 440 (1948) (director of Author's Guild of Author's League of America, Inc., seeking membership list).

within the state.⁶² This may extend to books which have been removed but which were regularly kept and maintained in the state.⁶³ Allowing such inspection is not an abuse of the court's discretion since it does not constitute an interference with the internal affairs of the foreign corporation.⁶⁴ The opinions are in conflict as to whether the laws of the forum⁶⁵ or those of the state of incorporation⁶⁶ are to be applied to foreign corporations.⁶⁷

V.

ENFORCEMENT OF THE RIGHT

Mandamus is usually considered the proper, if not the only adequate remedy to enforce the right of inspection.⁶⁸ Since the writ of mandamus has been abolished by the Federal Rules of Civil Procedure,⁶⁹ most cases involving attempts by directors to gain access to the corporate books have arisen in the state courts. Within the state, the remedy is properly enforceable in the forum where the records and custodians are located.⁷⁰

Traditionally the right has been enforced by a proceeding for mandamus instituted through a petition presented in the name of the state on the "relation" or complaint of the party beneficially interested.⁷¹ This

62. *Lavin v. J. C. Lavin Co.*, 264 App. Div. 205, 34 N.Y.S.2d 947 (1942); *Machen v. Machen & Mayer Electrical Mfg. Co.*, 237 Pa. 212, 85 Atl. 100 (1912). See also, 5 FLETCHER, PRIVATE CORPORATIONS § 2229 (perm. ed. rev. repl. 1952).

63. *Newmark v. C. & C. Super Corp.*, 4 Misc. 2d 693, 159 N.Y.S.2d 77, modified and *aff'd*, 3 App. Div. 2d 823, 160 N.Y.S.2d 936, *aff'd*, 3 N.Y.2d 790, 143 N.E.2d 796 (1957).

64. See *Donna v. Abbotts Dairies, Inc.*, 399 Pa. 497, 161 A.2d 13 (1960); *Machen v. Machen & Mayer Electrical Mfg. Co.*, 237 Pa. 212, 85 Atl. 100 (1912).

65. *Donna v. Abbotts Dairies, Inc.*, 399 Pa. 497, 161 A.2d 13 (1960).

66. See *State ex rel. Herman v. Goodsell*, 149 Wash. 143, 270 Pac. 297 (1928). See also, RESTATEMENT, CONFLICT OF LAWS § 200, comment a (1934).

67. See 5 FLETCHER, PRIVATE CORPORATIONS § 2229 (perm. ed. rev. repl. 1952). Cf. *Morris v. Pepsi-Cola Co.*, 21 App. Div. 2d 651, 249 N.Y.S.2d 565 (1964).

68. *Leach v. Davy*, 199 Mich. 378, 165 N.W. 927 (1917). An injunction, however, may issue when ancillary to another proceeding or when provided for by statute, BALLANTINE, CORPORATIONS § 166 (rev. ed. 1946). See also 5 FLETCHER, PRIVATE CORPORATIONS § 2251 (perm. ed. rev. repl. 1952).

In New York, an application for an order to grant inspection must be made in conformity with the requirements of N.Y.C.P.L.R., art. 78. See Bartels & Flanagan, *Inspection of Corporate Books and Records in New York by Stockholders and Directors*, 38 CORNELL L.Q. 289 (1953). See also, CAL. CORP. CODE § 3005.

69. Fed. R. Civ. P. 81(b). See *Toomey v. Wickwire Spencer Steel Co.*, 3 F.R.D. 243 (S.D.N.Y. 1942).

70. *Machen v. Machen & Mayer Electrical Mfg. Co.*, 237 Pa. 212, 85 Atl. 100 (1912); *Conerty v. Butler County Oil Refining Co.*, 301 Pa. 417, 152 Atl. 672 (1930) (The court of common pleas of the county in which the greater part of the property is located, and wherein the persons who have actual or technical control of such property reside, is the tribunal vested with jurisdiction to issue the writ.)

71. E.g., *State ex rel. Farber v. Seiberling Rubber Co.*, 53 Del. (3 Storey) 295, 168 A.2d 310 (1961).

procedure has been criticized, however, because it is “. . . a legal absurdity to entitle a proceeding in the name of the state as plaintiff when it is essentially only a civil action between private parties for the specific enforcement of an obligation imposed by law.”⁷² In many states, therefore, the real party in interest is named as plaintiff and the state is not even mentioned as a formal party.⁷³

Since mandamus is essentially a discretionary remedy,⁷⁴ the court may impose such safeguards as are suitable to protect the interests of all concerned.⁷⁵ However, in the jurisdictions which consider the inspection right to be absolute, such a writ will ordinarily issue as a matter of course. Those courts reason that inspection is necessary to enable a director to perform the duties of his office and hold that he need only show that he is a director and has demanded permission to examine the books and has been refused.⁷⁶

A director has no common law right to reimbursement and, in the absence of contract or statute, cannot require the corporation to reimburse him for legal expenses incurred in his fiduciary capacity.⁷⁷ Thus reimbursement of expenses incurred in connection with securing an order for inspection of corporate books has been denied.⁷⁸

VI.

RIGHT OF DIRECTORS IN PENNSYLVANIA

Relatively few cases in Pennsylvania deal with the director's right of inspection.⁷⁹ In *Machen v. Machen & Mayer Electrical Mfg. Co.*,⁸⁰ the Pennsylvania Supreme Court espoused an absolute rule, holding that a director has an unqualified right to inspect corporate books upon a mere showing that he is a director and that his demand has been refused.⁸¹ Inspection was granted despite allegations that petitioner had neglected his duties and was the president of a competing company. The court also

72. BALLANTINE, CORPORATIONS § 166 (rev. ed. 1946).

73. *Ibid.*

74. See 5 FLETCHER, PRIVATE CORPORATIONS § 2276 (perm. ed. rev. repl. 1952).

75. See *Schiller v. Flatbush Message Bureau*, 108 N.Y.S.2d 828 (Sup. Ct. 1951); 55 C.J.S. § 223 (Supp. 1965).

76. *People v. Central Fish Co.*, 117 App. Div. 77, 79, 101 N.Y.S. 1108, 1109 (1907); See also, *Davis v. Keilsohn Offset Co.*, 273 App. Div. 695, 79 N.Y.S.2d 540 (1948); *Machen v. Machen & Mayer Electrical Mfg. Co.*, 237 Pa. 212, 85 Atl. 100 (1912).

77. *Bailey v. Bush Terminal Co.*, 46 N.Y.S.2d 877, *aff'd*, 267 App. Div. 899, 48 N.Y.S.2d 324, *aff'd*, 293 N.Y. 735, 56 N.E.2d 739 (1944).

78. *Edelman v. Goodman*, 47 Misc. 2d 8, 261 N.Y.S.2d 618 (Sup. Ct. 1965). See also, *Newmark v. C. & C. Super Corp.*, 3 App. Div. 2d 823, 160 N.Y.S.2d 936, *aff'd*, 3 N.Y.2d 790, 164 N.Y.S.2d 42, 143 N.E.2d 796 (1957).

79. The right of the shareholder is protected by statute, PA. STAT. ANN. tit. 15, § 2852-308 (Supp. 1965). See also, *Hagy v. Premier Mfg. Corp.*, 404 Pa. 330, 172 A.2d 283 (1961) (shareholder's right).

80. 237 Pa. 212, 85 Atl. 100 (1912).

81. *Id.* at 213, 85 Atl. at 102.

concluded that, although this was a foreign corporation, since it was registered and doing business in the state, with all or most of its property and assets in the state, such inspection could be ordered.⁸²

A subsequent case,⁸³ however, casts some doubt upon the continued adherence to the rule of absolute right in Pennsylvania. The court while recognizing that a director is entitled to expert assistance, indicated, in dictum, that inspection would be denied to a director whose purposes would be in conflict with his fiduciary relationship.⁸⁴ This reasoning found its inception in the statutory language establishing the relationship of a director to the corporation:

Officers and directors shall be deemed to stand in a fiduciary relation to the corporation, and shall discharge the duties of their respective positions in good faith and with that diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in their personal business affairs.⁸⁵

Though this same duty is continued in the current Pennsylvania statute, it may be expected that Pennsylvania courts will follow the lead of a neighboring state⁸⁶ and hold the director's right of inspection to be qualified. Thus, access to the books and records may be denied to a director who seeks to inspect in bad faith or for an improper purpose.

VII.

CONCLUSION

Since the duty of a director to keep informed of corporate affairs depends to a great extent upon his access to the books and records of the corporation, his right to inspect is inherent in his office and should not be subjected to artificial controls or to the whims of the officers or other members of the board. It is submitted that a statutory provision, similar to that in California, should be enacted as a part of the states' corporate laws. The right, however, should be limited to those purposes reasonably related to the discharge of the director's fiduciary duties and not adverse to the interest of the corporation.

Martin G. McGuinn, Jr.

82. See note 70, *supra*.

83. *Strassburger v. Philadelphia Record Co.*, 335 Pa. 485, 6 A.2d 922 (1939).

84. See *Long v. Boyle*, 18 Luzerne 393 (Pa. 1916) (court refused preliminary injunction because purpose for inspection was moot).

85. PA. STAT. ANN. tit. 15, § 2852-408 (Supp. 1965).

86. *State ex rel. Farber v. Seiberling Rubber Co.*, 53 Del. (3 Storey) 295, 168 A.2d 310 (1961).